

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PARSONS & WHITTEMORE
ENTERPRISES CORPORATION,

Plaintiff,

v.

No. CV-07-0743-CG-B

CELLO ENERGY, LLC, formerly known as
Forest Energy Systems, LLC; BOYKIN
TRUST, LLC; JACK W. BOYKIN, an
individual; ALLEN W. BOYKIN, an
individual; and BIOFUELS OPERATING
COMPANY, LLC,

Defendants.

**MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FILED ON BEHALF
OF DEFENDANTS BIOFUELS OPERATING COMPANY, LLC, KHOSLA VENTURES,
LLC, RED SKY, LP, KHOSLA VENTURES II, LP, AND KHOSLA VENTURES
COMPANY**

Defendants BioFuels Operating Company, LLC ("BioFuels") and Khosla Ventures, LLC, Red Sky, LP, Khosla Ventures II, LP, and Khosla Ventures Company¹ (collectively the "Khosla Ventures Defendants") move the Court, pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure* to dismiss the claims asserted in Plaintiff Parsons & Whittemore Enterprises Corporation's ("P&W") Amended Complaint. As grounds, BioFuels and the Khosla Ventures Defendants state as follows:

1. A motion to dismiss pursuant to Fed. R. Civ. P. 26 should be granted "when the movant demonstrates beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1262

¹ Although Plaintiff's Amended Complaint names Khosla Ventures Company as a defendant, Khosla Ventures Company is not a legal entity and is not a proper party defendant.

(11th Cir. 2004) (internal quotations omitted); Fed. R. Civ. P. 12(b)(6). Although in determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, “where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff’s claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12 (b)(6) dismissal . . . [without] conver[ting] the motion into a motion for summary judgment.” *Brooks v. Blue Cross & Blue Shield*, 116 F.3d 1365, 1369 (11th Cir. 1997); *see also DePaola v. Nissan North America, Inc.*, 2006 WL 1181131, *2 (May 2, 2006, M.D. Ala. 2006) (court may properly consider exhibits attached to complaint in ruling on Rule 12(b)(6) motion).

2. All of the claims in P&W’s Amended Complaint [Doc. #158] are predicated upon the validity of a purported Option Agreement. The Option Agreement was attached and incorporated by reference as “Exhibit C” to P&W’s original Complaint [Doc. #1] and is referenced throughout P&W’s Amended Complaint. [Doc. #158]. For all of the reasons set forth in BioFuels’ Motion for Judgment on the Pleadings [Doc. # 143] and Reply Brief in support of Motion for Judgment on the Pleadings [Doc. #180], the purported Option Agreement is invalid as matter of law because it violates the Alabama Rule Against Perpetuities. All of the claims asserted in P&W’s Amended Complaint, therefore, necessarily fail. In support of this Motion to Dismiss P&W’s Amended Complaint, BioFuels and the Khosla Ventures Defendants incorporate by reference the arguments in BioFuels’ Motion for Judgment on the Pleadings and Reply Brief in Support of Motion for Judgment on the Pleadings as if set forth fully herein.

3. Based on the foregoing, which includes by reference BioFuels’ Motion for Judgment on the Pleadings and Reply Brief in Support of Motion for Judgment on the Pleadings, P&W’s Amended Complaint should be dismissed in its entirety.

Respectfully submitted this 10th day of October, 2008.

/s/ Russel Myles

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2008, I caused a copy of the foregoing to be served on the following persons by email and first class mail.

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